IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and **TWIN FALLS CANAL COMPANY,**	)	**CASE NO. CV-2008-551**
Petitioners,	)	
vs.	)	
DAVID R. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES**,	)	
Respondents.	)	

SURFACE WATER COALITION'S JOINT REPLY BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP, PLLC
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls Reservoir District #2

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

(See Service Page for Remaining Counsel)

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INTRODUCTION

The Coalition hereby submits this *Joint Reply Brief* in support of its petition for judicial review. IDWR, IGWA, and Pocatello ("Respondents"), each filed a response brief in this matter on April 30, 2009. While some of the response briefs address the stated issues on appeal, much of the argument offered by IGWA and Pocatello addresses matters that are not before the Court. Any such non-responsive argument should be disregarded.

The Director's actions in this case constitute an unconstitutional application of the CM Rules. The Coalition's senior surface water rights have been materially injured by out-of-priority ground water diversions and the Director has failed to lawfully account for and protect the Coalition from that injury. Accordingly, the Court should grant the requested relief on appeal.

ARGUMENT

I. IGWA's Request for Attorneys Fees is Barred by Idaho Law.

IGWA's request for attorneys fees pursuant to Idaho Code § 12-121 and I.R.C.P. 54(e)(1), must be rejected. Rule 54(e)(1) states that the Court may award fees "when provided for by any statute or contract". However, the Idaho Supreme Court has made it clear that sections 12-121, "does not, however, provide authority for an award of attorney fees on appeals from administrative agency rulings". *Cheung v. Pena*, 143 Idaho 50, 137 P.3d 417, 423 (2006). IGWA's request cannot stand.

II. The Respondents' Arguments Do Not Justify the Director's Unconstitutional Application of the CM Rules to the Coalition's Senior Surface Water Rights.

In an effort to support the Director's unconstitutional application of the CM Rules in this case, Respondents mischaracterize the Coalition's argument. The Respondents fabricate

"strawmen" arguments.[1] Notably, the Respondents assert that the Coalition is claiming it is "entitled to full delivery of both their natural flow and storage water rights, regardless of whether the full amount of each right is required to produce a crop." *IDWR Br.* at 7; *IGWA Br.* at 19 (the Coalition "argues that the Director abused his discretion in determining for purposes of their delivery call that the SWC was entitled to an amount of water less than the full amount decreed in their water rights"); *Poc. Br.* at 14 ("SWC flatly asserts that the Director's obligation upon receiving its allegations of injury was to deliver the amount of water on the face of the SWC licenses and decrees"). The Respondents are wrong and the Court should not be distracted by this hyperbole.

Rather than seeking administration without regard for whether the resulting water can be put to beneficial use, the Coalition seeks lawful water delivery and administration of junior priority rights consistent with Idaho's constitution, statutes, and the CM Rules. So long as the Coalition members can beneficially use the amount of water stated on their decrees, they have a right to use that water prior to a junior ground water user taking that water. That is the law in Idaho.

Justice Schroeder plainly recognized this constitutional mandate and its application in conjunctive administration:

> However, to the extent water is available within the amount of the water right but is diminished by junior users, the presumption favors the senior users' rights to the water.

R. Vol. 37, p. 7078.

[1] In addition, IGWA and Pocatello argue several issues throughout their briefs as if they were "appellants" in this case. Rather than "respond" to the issues on appeal set forth in the SWC's *Joint Opening Brief*, IGWA and Pocatello argue matters that they did not appeal and hence are not at issue in this case. As such, these so-called "facts" and irrelevant arguments in support of theories should be ignored by the Court. *See IGWA Br.* at 4-15, 28-29, 38-39, 41-42; *Poc. Br.* at 3, 7-10, 15-16, 20, 23. The fact remains IGWA and Pocatello did not appeal the Director's *Final Order* in this case and any effort to re-litigate or re-argue their case now is barred.

The Director accepted this finding in the September 5, 2008 *Final Order*. R Vol. 39 at 7387. The Director erred, however, in ignoring the water right decrees, and creating a process whereby he determined the amount of water each Coalition entity had a right to use and then forced the Coalition to prove otherwise. This paradigm wholly ignores the presumptive effect of the decree and forces the Coalition members to "re-prove" their decrees. This "minimum full supply" concept fails as a matter of law. In *AFRD #2 v. IDWR*, 143 Idaho 862, 873 & 878 (2007), the Court stated:

> Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules.
>
> * * *
> The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed.

. The proper presumption is that a senior is *entitled* to beneficially use his decreed water right. Indeed, a decree or license confirms the amount of water that can be beneficially used. *See Head v. Merrick*, 69 Idaho 106, 108 (1949); Idaho Code §§ 42-220 ("Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein"); 42-1420(1) ("The decree entered in a general stream adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system").

In order to apply the presumption correctly, the Director must begin with *and acknowledge* the senior's right to the decreed water rights. The senior does not have to "re-prove" his water right. Here, the Director overstepped his authority by disregarding the decrees and creating an initial assumption that the Coalition had no need for their decreed rights.

> In applying that methodology the Supreme Court anticipated that the Director would approach the resolution of the call ***applying the presumption favoring***

> ***the senior right holder***, once the threshold showing of material injury has been met by the senior right holder. ***It is not clear that the Director applied the burdens***.

R Vol. 37 at 7074 (emphasis added).

It is undisputed that the SWC has been materially injured by out-of-priority ground water diversions. Once material injury is established, the junior then carries the burden to show, by "clear and convincing evidence", to challenge that finding. *See Moe v. Harger*, 10 Idaho 302, 303-04 (1904); *Josslyn v. Daly*, 15 Idaho 137, 149 (1908); *see also AFRD #2* 143 Idaho at 878 ("Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call"). If the junior fails to carry this burden, as was the case in this proceeding,[2] then the Director must either: 1) curtail the junior right; or 2) allow the diversion to continue out-of-priority through an approved CM Rule 43 mitigation plan. *See* CM Rule 40.02(b) & (c). This is the result mandated by the plain language of the statutes and CM Rules. Lawful water right administration through a constitutional application of the CM Rules is all the Coalition seeks.

A. General Policy Arguments Do Not Excuse the Director's Failure to Properly Administer Water Rights Pursuant to the Plain Language of Idaho's Statutes and CM Rules.

Instead of following the criteria provided by Idaho's water distribution statutes (Idaho Code §§ 42-602, 607) and CM Rules (Rule 40, 43), IDWR argues the Director's actions were justified in the name of "optimum development of water resources", even claiming that Idaho's Ground Water Act limits senior surface water rights in conjunctive administration. *See IDWR*

[2] IGWA raised numerous defenses throughout the course of this proceeding, including theories that the Director failed to convene a "local ground water board", the Coalition was not entitled to an "enhanced water supply", the Coalition suffered "no injury", the call "interfered with the full economic development of the aquifer", and that the call was "futile" and would result in "waste". R Vol. 31 at 5926-30. Both the Hearing Officer and Director rejected these defenses. IGWA did not appeal the Director's rejection of its defenses.

Br. at 11-13. IGWA advocates that "it is the crop irrigation requirements that set the obligation of junior right holders to supply mitigation, not an authorized maximum quantity set out in the decree." *IGWA Br.* at 22.

Contrary to these claims, the Idaho Constitution and statutes addressing the Idaho Water Resource Board's formulation of a state water plan do not authorize "injury" in the name of "optimum development" of unappropriated water. *See* IDAHO CONST., art. XV, § 7 (Water Resource Board "shall have power to ***formulate and implement a state water plan*** for optimum development of water resources in the public interest") (emphasis added); Idaho Code § 42-1734A ("The board shall … ***formulate, adopt and implement a comprehensive state water plan*** for conservation, development, management and optimum use ***of all unappropriated water resources*** and waterways of the state in the public interest") (emphasis added). Moreover, the *Ground Water Act* is simply inapplicable. *See* Idaho Code § 42-226; *Musser v. Higginson*, 125 Idaho 392, 396 (1994) ("we fail to see how I.C. § 42-226 in any way affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892") (emphasis added).[3] As such these arguments should be rejected.

B. By Not Recognizing the Coalition's Decreed Water Rights the Director Impermissibly Shifted the Burden to Senior Water Users in Administration.

Once the senior makes a *prima facie* showing of injury, the initial administrative target must be the water right not some artificial target created by the Director.

[3] The senior water users in *Musser* held surface water rights with a priority date of April 1, 1892. *See* 125 Idaho at 392 ("The springs which supply the Mussers' water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer)."). *See also, Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 91-00005, July 2, 2001) ("*BW5 Order*"):

> First, the groundwater management statutes do not apply to water rights prior to their enactment in 1951. *Musser*, 125 Idaho at 396, 871 P.2d at 813 (statutes do not affect rights to the use of groundwater acquired before enactment of the statute).

BW5 Order at 27

The following is not in dispute on appeal:

- Out-of-priority ground water pumping has materially injured the Coalition's use of their senior water rights. R Vol. 37 at 7073, 7076. As such, the Director must apply the presumption that the "senior water user is entitled to the amount of water set forth in a license or decree." *AFRD#2,* 143 Idaho at 878.
- In light of this material injury, the burden of proof shifts to the junior to show a defense to the senior's call. *See generally*, R Vol. 37 at 7072-75. The factors set forth in CM Rule 42.01 are in the nature of defenses to the claim of material injury. R Vol. 37 at 7078.[4]
- If material injury is determined, as was found in this case, the Director and the watermaster have a "clear legal duty" to regulate junior ground water rights and distribute water to the senior right.[5] *See* Idaho Code § 42-607; CM Rule 40.01.
- In order to be effective, the Director and watermaster must distribute water in a timely manner. *See AFRD #2*, 143 Idaho at 874 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call").

To date, the Director's method of responding to the Coalition's needs has violated these basic legal principles. Rather than following the law, the Director created a "target" quantity and then sought to adjust administration requirements up or down in response to the vicissitudes of the irrigation season. This "minimum full supply" process was questioned in the *Recommended*

[4] The factors in CM Rule 42.01 investigate the seniors' supply and actual demand, or need, in the time frame in question to assure that water provided by administration of junior rights will be applied to beneficial use and not wasted.

[5] Provided, a junior causing injury has the option to file and seek approval of a Rule 43 Mitigation Plan so that he could divert out-of-priority while fully mitigating the injured senior right. *See* CM Rules 40.01.b, 43.

Order. R.Vol.37 at 7086-9;[6] and then relabeled as "reasonable in-season demand" in the *Final Order*, R. Vol. 39 at 7386.

As the protocol morphs from "minimum full supply" to what the Director now coins as a "reasonable in-season demand", the senior water user immediately must engage to re-adjudicate its water right. R Vol. 39 at 7499**; Attachment A** (Director's 2009 *Draft Protocol*). As set forth in the example of the Director's *Draft Protocol for Determining Reasonable In-Season Demand and Reasonable Carryover*, the proposal is to identify a senior's "baseline demand" based upon diversions from 2006, identify a forecasted supply, and then re-evaluate conditions in July and again in September. Pursuant to this new regime, junior ground water users are only required "to provide evidence, to the satisfaction of the Director", that it can secure sufficient storage to mitigate the predicted "demand shortfall". While the shortfall to the "reasonable carryover deficit" is purportedly to be supplied "two weeks" after the date of storage allocation, the remainder is not required until sometime in September – the so-called "time of need".

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[6] At section XIII of his *Recommended Order* (R Vol. 37 at 7086-95), Justice Schroeder cataloged the deficiencies of the way the "minimum full supply" concept was applied in this case. He expressed concerns about basing the calculation on a single wet year, rather than several years and not being nimble in changing the baseline as conditions changed. In section XIX (R Vol. 37 at 7095-100), he made suggestions to correct these deficiencies. He cautions, however, that use of the protocol of a "minimum full supply" is not an avenue to modify licensed or decreed rights. R. Vol. 37 at 7092. The Hearing Officer further provided:

> **6. Use of the process of establishing a minimum full supply departs from the practice of recognizing a call at the level of the licenses or decrees, understanding that if less water is needed less will be delivered**. The history of surface to surface water administration has been that if a senior water user made a call within the licensed or decreed right the watermaster shut down delivery of water to a junior water user if necessary to deliver the licensed or decreed amount to the senior. … SWC maintains the same process should be applicable in the ground water to surface water management. The logic of SWC in objecting to the Director's use of a minimum full supply is difficult to avoid. …
>
> **7. Use of the minimum full supply analysis starts at a different point from recognizing the right of a senior right holder to receive the full amount of the licensed or decreed right, attempting to make an advance judgment of need.** Inherent in the application of the minimum full supply is the assumption that, if it accurately defines need, use of water above that amount would not be applied to a beneficial use and would constitute waste. This strains against the assumption that the senior users are entitled to the full extent of their rights licensed or decreed rights which at some point has been determined to be an amount they could beneficially use.

R Vol. 37 at 7090-91 (emphasis added).

Inevitably, the proposed process perpetuates the same errors found in the Director's prior scheme, water will not be delivered in a timely manner and ground water users will always be authorized to divert out-of-priority despite not having an approved Rule 43 mitigation plan in place. This process unconstitutionally infringes upon the priority doctrine by giving water to the juniors at the expense of the seniors. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982); *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away.").

Bear in mind that the commencement of the call is based on the manager's "judgment of need." CM Rule 40.03 provides:

> **03. Reasonable Exercise of Rights**. In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

Thus, if the water requested within the water right will be applied to a beneficial use without waste, it is "needed" and must be provided. The burden then shifts to the junior user to show, by "clear and convincing evidence," that it will not be applied to a beneficial use, or will otherwise be wasted.[7] That is the law and the Director is bound by that law.

C. The Director's System Results in Untimely and Unconstitutional Water Right Administration.

[7] The "need" element of the Director's newly created "reasonable in-season demand" protocol, however, is somewhat different. The inquiry is not whether the senior will apply the water to beneficial use without waste, but instead the inquiry has become does the Director, in the exercise of his discretion, believe the senior "needs" the water, or, more correctly stated, does the Director, in the exercise of his discretion, believe the senior "needs" its water right. By transmuting the question of need from whether the senior will apply the water to a beneficial use without waste into the different question of whether the Director believes under the circumstances the senior needs the water is a re-adjudication of the senior's water right prohibited by the *AFRD #2* Court. *See* 143 Idaho at 878.

Starting from a fabricated "baseline" – rather than the decreed quantity – will also prove incorrect because this paradigm will invariably result in retrospective administration, i.e., late mitigation water delivery, instead of prospective administration. Since a junior ground water user has no obligation to mitigate a "shortfall" to a senior's "reasonable in-season demand" until September, a time when the junior is likely harvesting or has already harvested his crop, the out-of-priority ground water diversion may be finished for the year and thus the Director has no credible method to regulate or curtail the junior in the event mitigation water is not provided as ordered.

As held by Judge Wood, the failure to provide for timely administration ***becomes the "decision"*** by burdening and diminishing the senior right:

> Second, in order to give any meaningful constitutional protections to a senior water right, a delivery call procedure must be completed consistent with the exigencies of a growing crop during an irrigation season. . . . Moreover, ***any delay occasioned by the process impermissibly shifts the burden to the senior right, thus diminishing the right***. The concept of time being of the essence for a water supply for irrigation rights is one of the primary basis for the preference system in § 3 of Article XV of the Constitution.
>
> * * *
>
> In practice, ***an untimely decision effectively becomes the decision***, i.e. "no decision is the decision."

Order on Plaintiffs' Motion for Summary Judgment at 93, 97-98. **Attachment A** to *SWC Joint Opening Brief* (emphasis added).

The Director's actions to date all prevent timely administration to ensure the senior right is protected during the irrigation season. It is undisputed that no water has been provided to mitigate the Coalition's injuries ***during*** the irrigation season.[8]

Idaho law provides that water is not available to a junior groundwater user *if use of that water would affect the present or future use of any prior surface or ground water right*. *See*

[8] The Respondents do not even dispute the fact that no formal exchange was approved in 2005 and no water was actually delivered to the SWC during any irrigation season in which injury was found.

Idaho Code § 42-237a(g). Thus, once material injury has been shown, the offending junior that has no viable defense to the call *no longer has a source to service its water right, and must curtail*. The junior can continue to pump ***only*** if it has a Rule 43 mitigation plan in place.[9]

The CM Rules contemplate the adoption of long-term mitigation plans to prevent or compensate for material injury caused by junior ground water diversions.[10] CM Rule 10.15. Rule 43 provides for long-term mitigation plans, after providing a senior right holder with due process (notice and hearing). Thus far, few of the junior respondents to this call have submitted long-term mitigation plans, but have instead relied upon the Director's created "replacement water plans": short term, one time, immediate responses to the requirement that a senior's water be replaced so that the junior may pump out-of-priority. Justice Schroeder rejected "replacement water plans" because the Rules do not provide for them, and because they exclude the senior and deny him due process. The Director wrongly rejected Justice Schroeder and has re-instated the "replacement water plan" scheme in his *Final Order*. *See* Pat VI, *infra*.

Without long-term mitigation plans, in the year-to-year *ad hoc* administration in which we currently find the aquifer, the Director contemplates setting an initial "benchmark" or "baseline demand" after the April 1st Heise natural flow forecast – again in mid-summer after the

[9] In the *Recommended Order*, Justice Schroeder acceded to the use of a "minimum" benchmark at the commencement of administration to replace the actual water right – responding to the junior users concern that they may need to lease water during an irrigation season at great expense only to find that the senior water right holder would not apply the full amount of its right to beneficial use, thus causing the expense for no good purpose. This concern arises only because of the present refusal of the junior to look beyond instantaneous "replacement water plans" that allow no lead time for contemplation, planning, negotiation, or procurement. For instance, one could contemplate that a mitigation plan approved for a ten-year time frame would rely upon taking options to procure water if needed, but would allow the original right holder to use the water if not needed for mitigation. In this way, the junior would be paying only exactly the amount the market would require to allow him to continue to pump if his "number came up" to fulfill an injured senior water right, i.e., the option price.

[10] In order to have an effective long-term mitigation plan in place, the plan would necessarily need to supply mitigation water in an amount to compensate for the effect on the water right instead of just the "minimum full supply" or "reasonable in season demand" because of the impossibility of saying that in future years the senior will not apply its water right to a beneficial use without waste. These types of mitigation plans would put the entirety of the current conflict at rest.

runoff is complete – and finally sometime in September. This will occur without benefit of previous carryover storage.[11]

This entire unconstitutional retrospective, late delivery (or no delivery) paradigm can be avoided by requiring mitigation for the full amount of water that the Coalition will put to beneficial use, i.e. the water right; or, alternatively, curtailing out of priority depletions.

III. The Director Failed to Properly Account for Injury to the Coalition's Senior Natural Flow and Storage Water Rights.

IDWR creates a false comparison in support of the Director's "total water supply" analysis. *IDWR Br*. at 9-10. In arguing against the Director's duty to analyze injury to individual natural flow and storage water rights, IDWR asserts that the "SWC's decreed natural flow rights total approximately 6,804,325 acre-feet". *Id.* at 10. In calculating this number IDWR wrongly assumes that the Coalition's natural flow rights would be diverted at their decreed quantities every single day of the irrigation season.

The Coalition's natural flow rights are based upon decreed diversion rates and are administered by priority, hence junior rights are curtailed as dictated by the available water supply. As explained by Lyle Swank, the Water District 01 Watermaster:

[11] In those years that ample water is available, administration will not matter except to the extent there should be assurance of reasonable carryover, which the Director currently will not do. In a year of shortage, or successive years of shortage, the following scenario is inevitable: Anticipating the need for its full water right, but facing predictions of water shortages, seniors will call for water to fulfill the right. The Director will set an initial benchmark that is less than the water right. The junior does not have a long-term mitigation plan to meet the water right, but offers a "replacement water plan" to meet the benchmark or "baseline", which the Director accepts and allows the junior to commence out of priority depletions of the aquifer, and consequently the reach gains to the Snake River relied upon by the senior. The senior diverts its water right, as it is entitled to do. The season is either normal, or hot, and shortages continue. The benchmark is either adjusted or not adjusted as the season progress. The difference between the amount of water that the junior is prepared to replace up to the benchmark, and the amount of water in the water right which the senior is entitled to apply to beneficial use and actually applying the beneficial use is not available in the "replacement water plan." At some point, to continue out-of-priority diversions, the junior must obtain new water during the season in a scarce market. The price will be concomitantly higher because of the scarcity, leaving the junior to decide whether to sacrifice his profit for mitigation water or quit pumping. The senior has no part in this process. Likely as not, without a prospective mitigation plan, both junior and senior will go without.

> Q. [BY MR. SIMPSON] With respect to the entities identified on Exhibit 9701, how do you deliver water to these entities as part of your daily – daily work?
>
> A. [BY MR. SWANK] Our daily water right accounting goes through the process of collecting data from multiple reservoir and river gauges, the diversion data; determines what the available natural flow is in different reaches of the river; computes what the amount of storage is in those different reaches; determines the amount of water diverted, how much was natural flow and how much was storage. That's gross simplification, but it hits the major steps.
>
> Q. So in essence, you attempt to identify how much natural flow is available in the system in looking at the runoff, the natural flow in the river – looking at the Heise gauge, for example, and other pertinent river gauges – and then determine from a priority standpoint what priority's on and deliver water to those priorities?
>
> A. Yes. That is part of the daily water – of the water right accounting process.

Tr. Vol. IV, p. 834, ln. 25 – p. 835, ln. 20; *see also Id.* at 838, lns. 3-6 (water is delivered "pursuant to the provisions of those previous decrees").

Mr. Swank further confirmed that administration of surface water rights in the water district considers the supply available to natural flow *and* storage water rights, not just some amalgamation of the two. Tr. Vol. IV, p. 858, lns. 3-21.

The Coalition's natural flow rights are not based upon volume, as implied by IDWR, and there is no basis to combine the Coalition's total supply for purposes of conjunctive administration. Moreover, each natural flow right is not diverted to its decreed rate of diversion every day of the irrigation season. Those natural flow water rights are curtailed by priority depending upon the water supply available in the river. IDWR's alleged "total authorized water supply" is misleading and ignores how the rights are actually diverted and administered by the Water District 01 Watermaster.

Contrary to IDWR's argument, the Director's examination of a "total water supply" does not "ensure the SWC's right to make beneficial use of the water was protected." *IDWR Br.* at 12. Instead, it deviates from what is required by law, which demands that the Director and watermaster analyze individual water rights and determine if a junior right interferes with that use. The "total water supply" concept is not applied in surface water right administration and it impermissibly allows the Director to authorize injury to the Coalition's rights by dictating that storage be exhausted to make up for injury to a natural flow right. The Hearing Officer acknowledged this:

> **3. In analyzing a total water supply to determine if there is material injury each element of the water rights should be considered and proper recognition is given to the right to carryover storage – there may be material injury to the right of reasonable carryover if the provision of full headgate delivery exhausts what would otherwise be the reasonable carryover storage amount.** The first step in deciding if there is material injury should be to determine how much a surface water user's natural flow right has been diminished by junior ground water pumping. Evidence indicates that there has been a long term trend of declining natural flow water, causing the members of the SWC to begin the use of storage water earlier and to a greater extent. The diminution of natural flow results in a reduction of the storage water right by the amount of water withdrawn from storage to meet the need that could not be met by the natural flow right as a consequence of ground water pumping. All SWC members are entitled to reasonable carryover storage. If depletion of the storage right to make up the loss of natural flow reduces the amount of carryover storage below the level of reasonable carryover there is **material** injury and that amount must be made up through curtailment or replacement, or another form of mitigation.

R Vol. 37 at 7114 (emphasis in original).

Although the Coalition members rely upon storage water to varying degrees depending upon their natural flow rights (and administration of those rights vis-à-vis one another), their use of storage should not be dictated by the injury caused by junior ground water diversions.

A. IDWR Provides No Legal Authority to Justify the Director's Failure to Provide Water to Mitigate the Injury Suffered in 2005.

IDWR provides no response to the fact the Coalition received no water during the 2005 irrigation season. Importantly, IDWR provides no explanation or response to the fact that no exchange was approved to show that IGWA had water to provide during the 2005 irrigation season. Instead, IDWR argues that the Director's action in 2005, including a July 22, 2005 supplemental order on IGWA's "replacement water plan," was "accepted by the Hearing Officer". *IDWR Br.* at 34. Incredibly, IDWR ignores the Hearing Officer's finding on this point, which was accepted by the Director in his *Final Order*:

> **6. The process utilized in this case deviated from that anticipated by the Supreme Court.**
>
> * * *
>
> **2. A hindrance to reasonable carry-over storage constitutes material injury**.
>
> **3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights.**
>
> * * *
>
> **a. 1995 was a wetter than average year, diminishing the validity of use of that year to establish the base for a minimum full supply and underestimating the material injury likely to occur in 2005 and subsequent years**. . . . Basing the minimum full supply on a wet year makes it likely that material injury was underestimated in 2005 and subsequent year, unless an adjustment is made at the outset to account for the effects of a greater than average amount of precipitation through the year.
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> * * *
>
> **6. The minimum full supply established in the May 2, 2005, Order is inadequate to predict the water needs of SWC on an annual basis.**
>
> *** * ***
>
> **2. Replacement water has not been provided in the season of need.**

R Vol. 37 at 7073, 7076, 7092, 7097, 7111-12 (bold in original).

In other words, the Hearing Officer concluded: 1) the process used by the Director in 2005 did not follow the *AFRD #2* Court's decision; 2) the Director's "minimum full supply"

"underestimated" the material injury to the SWC in 2005; and 3) the "replacement water plan" process did not follow the CM Rules and no water was provided to the Coalition in 2005. Clearly, the Hearing Officer did not "accept" the Director's actions in 2005, including the July 22, 2005 supplemental order approving IGWA's "replacement water plan".

IDWR claims that despite not providing any water during the 2005 irrigation season, the fact the Director allowed "IGWA to provide its replacement water to TFCC in 2006 provided TFCC with flexibility". *IDWR Br.* at 35. This "flexibility" argument does not address the fact that TFCC was injured in 2005 and was not provided any timely relief. IDWR cites no authority to support its theory. Clearly, the Director's actions in 2005 were erroneous.

B. The Director Failed to Perform Any Lawful Administration in 2006 and the Ad Hoc Rationale Offered in the Summer of 2007 Was Untimely.

IDWR claims the Director's actions were acceptable in 2006 since the Director determined at the end of June in that year "it was clear from the 2006 Join Forecast that members of the SWC would have a reasonable supply by which to irrigate and would not be materially injured". *IDWR Br.* at 37. The Director's 2006 *Third Supplemental Order* was predicated upon the same "minimum full supply" used in 2005, an amount which the Hearing Officer declared "underestimated" the material injury to the SWC members. The fact that Water District 01 does not finalize its accounting until the following spring, in order to account for gauge shifts and to receive final information from the USGS, does not excuse the failure to provide water to an injured senior right during the irrigation season. As such, IDWR's argument on this point is inapposite.

IDWR does not even attempt to support the Director's non-action during the rest of the 2006 irrigation season. Despite the Coalition's request for administration, the Director refused to regulate junior priority ground water rights pursuant to his statutory duty and instead waited until

May 2007 to find "no injury" occurred in 2006 based upon his "assumption" about how the SWC entities operated that year. *See SWC Opening Brief* at 17-18. This approach is unsupportable under the law and demonstrates yet again how the Director did not timely administer water rights in 2006.

C. IDWR Cannot Justify the Director's Failure to Provide Water to the Injured Coalition Members in 2007 Wherein the Director used the "Minimum Full Supply" as an Arbitrary "Cap" on Water Use.

Despite the express findings from the Hearing Officer that invalidated the Director's actions in 2007 (which the Director affirmed in the *Final Order*), IDWR curiously argues now that those actions were proper and "timely". *IDWR Br.* at 37-40. Justice Schroeder plainly found that the Director's use of a "minimum full supply" as a "cap" in 2007 resulted in a "re-adjudication" of the SWC's water rights:

> **g. Using the minimum full supply as a fixed amount in effect readjudicates a water right outside the processes of the SRBA.** Treating the minimum full supply as a cap reducing the right to mitigation in carryover storage has profound consequences. In practical effect it adjudicates a new amount of the water right outside the SRBA without a determination of specific factors warranting a reduction. . . . When treated as a fixed amount in 2007 it had great significance beyond its intended purpose.

R Vol. 37 at 7095.

Consequently, the Director's administration in 2007 did not follow the law, or even the Director's own prior orders. Despite the acknowledged failings in 2007, IDWR now misstates the facts and wrongly alleges that "IGWA was positioned during the season of need to mitigate TFCC's injury". *IDWR Br.* at 40. Yet, the record demonstrates that IGWA was not positioned to provide sufficient water during the irrigation season since they did not even enter into the lease for the water they proposed to provide until January 9, 2008. **Ex. 4603.**

Moreover, the Director's own *Seventh Supplemental Order* contradicts IDWR's argument, since it was clear that 93% of the water IGWA acquired in 2007 was provided for mitigation actions in Water District 130. *See* Ex. 4600 at 8 (only 5918 acre-feet of 65,145.8 acre-feet were available). IDWR fails to explain how 5,819 acre-feet available to IGWA as of December 27, 2007 was sufficient to mitigate the 17,345 acre-feet injury that the Director determined TFCC suffered during the 2007 irrigation season. Clearly it was not adequate, and IDWR cannot dispute the fact that absolutely no water was provided to TFCC during the irrigation season.[12] IDWR cannot credibly claim that the failure to administer junior priority ground water rights, or provide timely mitigation water to TFCC in 2007, was acceptable or "timely."

IGWA argues in support of the untimely administration in 2007 by alleging that "TFCC was free to divert as much water as it needed during the 2007 irrigation season, knowing that IGWA would transfer water into their storage account in the amount of the injury once the final accounting for 2007 was completed." *IGWA Br.* at 13. To the contrary, it was clear that IGWA did not have sufficient water for TFCC to divert and use and the Director took no action to order any water transferred to TFCC during the 2007 irrigation season.

In summary, IGWA's alleged after-the-fact transfer in January 2008 did not mitigate the injury inflicted upon TFCC's senior water rights that occurred during the 2007 irrigation season.

IV. Pocatello Mischaracterizes the Orders in This Case in an Effort to Claim the Director's Injury Determinations Have Been Accepted.

Pocatello, like IDWR, argues that the Hearing Officer accepted the Director's injury findings because the "Recommendations *did not* include a finding that the amounts of injury calculated through the Director's interim orders over the course of the proceedings were

[12] The "shell game" that IGWA attempted to play in 2007 was revealed by the above accounting, hence the reason that IGWA had to lease additional water from Pocatello in January 2008.

erroneous" and that "[t]he Hearing Officer affirmed the Director's determinations regarding injury for 2005-2007, based on evidence in the record." *Poc. Br.* at 7, 16. A plain reading of both Justice Schroeder's *Recommended Order* and the Director's *Final Order* demonstrates otherwise.

Pocatello simply ignores Justice Schroeder's decision relative to the "minimum full supply" and "reasonable carryover" calculations. The Hearing Officer did not approve the Director's injury calculations and instead found them to be "inadequate" and "underestimating the material injury" suffered by the SWC. R Vol. 37 at 7092, 7097.

Since Justice Schroeder concluded that the Director's "minimum full supply" "underestimated" the injury caused to the SWC water rights and was "inadequate" to protect those rights on an annual basis, it is undisputed that he found the Director's interim orders issued over the course of these proceedings were in error. Moreover, Pocatello's argument regarding the Director's actions and orders in 2007 finds no support in the Hearing Officer's decision, where he held the decisions resulted in a "re-adjudication" of the SWC's senior rights. R Vol. 37 at 7095. Therefore, Pocatello's claim and selected citations that the record actually supports the Director's injury findings is contrary to the Hearing Officer's decision on this issue (which was accepted by the Director in his *Final Order*).[13]

A. Pocatello's Reliance Upon General Policy Concepts is Misplaced and Does Not Excuse Injury to the Coalition's Senior Water Rights or the Director's Failure to Follow Idaho's Water Distribution Statutes and the CM Rules.

[13] Specifically, the Hearing Officer considered the information cited by Pocatello and, as identified above, plainly found that the Director's "injury" and "reasonable carryover" calculations were "inadequate" and constituted an unlawful "re-adjudication" in 2007. The Court should similarly reject Pocatello's theories here. After all, Pocatello did not appeal the Director's decision, hence it is not in a position to re-argue its dissatisfaction with the fact that the injury calculations were found to be erroneous.

In support of the Director's actions in this case Pocatello wrongly alleges that the Legislature enacted Idaho Code § 42-101 consistent with, or in reference to, Article XV, Section 5 of the Idaho Constitution.[14] *Poc. Br.* at 12. Pocatello misreads the constitutional provision since it only applies "among" irrigators within a specific project (i.e. "as among such persons"), not between the rights of unrelated water users not within an irrigation project. *See* IDAHO CONST., art. XV, § 5 (emphasis added).

Both Section 4 and Section 5 of Article XV plainly apply "among" those persons ***within*** water delivery organizations such as canal companies and irrigation districts where persons have settled the land with "the view of receiving water for agricultural purposes, under a sale, rental or distribution thereof."[15] *Id.*

Pocatello's citation to CM Rule 20's policy statement and the Director's use of the cited provision in his decision ignores the controlling condition that applies "as among such persons" within those irrigation projects and purports to expand the language and make it applicable to all other water rights, contrary to the constitution's plain language. *See Poc. Br.* at 13. Nothing implies that any "reasonable limitations" the Legislature might prescribe in that context applies to junior appropriators that are not part of the irrigation project. Moreover, the only statute that the Legislature has passed to address this provision is Idaho Code § 42-904, which essentially affirms that the prior appropriation doctrine applies as between different classes of users within an irrigation project.[16]

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[14] Judge Wood carefully reviewed and analyzed the Constitutional Convention, including the cited provision, which was approved by the *AFRD #2* Court. *See* Attachment A to *SWC Joint Opening Brief.*

[15] *See Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 604 (1904) (Sullivan, C.J., *dissenting*) ("The provisions of said section 5 contemplate that ditch owners must furnish water to the extent of their ability to all settlers under their ditches in the numerical order of their settlements or improvements, thus contemplating that the rental right to the use of such waters should be given to the settlers in accordance with the priority of their settlement or improvement, carrying out the theory that the first settler in time was first in right.").

[16] *See Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 543 (1963).

Contrary to Pocatello's argument and the reference in CM Rule 20, the Idaho Supreme Court has expressly recognized the limits of this section:

> The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from a natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used "under a sale, rental or distribution" ***and to point out the respective rights and priorities of the users of such waters*****.** It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes. And so sec. 4 is dealing chiefly with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities ***as between water users and consumers who have settled under these ditches and canals*** and who expect to receive water under a "sale, rental or distribution thereof." The two sections must therefore be read and construed together.
> …
>
> "Mr. Claggett: Mr. Chairman, both of these sections [4 and 5] apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental, or distribution.'

Mellen v. Great Western Sugar Beet Co., 21 Idaho 353, 359 & 361 (1912) (emphasis added).

Article XV, Section 5 therefore only applies as among users within an irrigation project and cannot be construed to imply some undefined "public interest" criteria that limits or precludes administration of other water rights. Neither the Director nor IDWR are authorized to expand its meaning and create a new "condition" between the Coalition's senior surface water rights and junior ground water right holders through some undefined "public interest" criteria. In Idaho, where a "constitutional provision is clear, the Court must follow the law as written and, thus, when the language is unambiguous, there is no occasion for rules of construction." *Hayes v. Kingston*, 140 Idaho 551, 553 (2004).

B. The Director's Actions are Not Consistent with the Statutory and Constitutional Framework.

Pocatello seeks to support the *Final Order* with a generic claim that the Director's factual determinations were consistent with the statutory and constitutional framework. *Poc. Br.* at 15. Rather than address the specific statutes and CM Rules that guide the Director's and watermaster's water right administration duties (Idaho Code §§ 42-602, 607, CM Rule 40), Pocatello alleges the Director acted properly in the name of "public interest" and "reasonable use". Coincidentally, Pocatello creates the same "strawman" as IGWA and IDWR by alleging the SWC's demand for all of the decreed quantities all of the time would have required vast curtailment inconsistent with "reasonable use" and the "public interest" and therefore cannot be accepted.

Pocatello twists the "public interest" and "reasonable use" concepts into a "catch-all" justification for the Director's actions. Pocatello's claim that the Director is authorized to injure a senior's water right in order to allow juniors to divert out-of-priority is rooted in a "common property" or "riparian doctrine" theory, which has been soundly rejected in Idaho since statehood. In explaining the prior appropriation doctrine in *Drake v. Earhart*, 2 Idaho 750, 755-56 (1890), the Idaho Supreme Court renounced the same theory being advanced by Pocatello, IGWA, and IDWR, and explained that a senior must beneficially use the water, not waste it, in order to have that water delivered. *See also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575 (1973) (confirming that Idaho does not follow a "riparian" approach).

The question in a delivery call turns on whether a senior appropriator can beneficially use, i.e. not waste, water. No Coalition member was found to have "wasted" water that is diverted and used within its decreed quantities. Further, Justice Schroeder and the Director both

concluded that the Coalition employed "reasonable" and efficient diversion and conveyance systems. R Vol. 37 at 7101-02; R Vol. 39 at 7382. These findings were not appealed.

The fact the Coalition's water rights have been decreed or licensed confirms that they can put the decreed quantities to beneficial use. Accordingly, since the junior water users failed to prove any defenses and did not show that the Coalition will not beneficially use the water called for, the Director cannot temper his administration or excuse some injury in the name of "public interest" or "reasonable use". Consequently, Pocatello's arguments are unpersuasive and should be rejected.

V. The Director's Failure to Provide for "Reasonable Carryover Storage" is an Unconstitutional Application of the CM Rules.

Former Director Dreher succinctly identified when carryover storage water should be provided to the Coalition members:

> Q. [BY MR. BROMLEY]: And for purposes of reasonable carryover, when, under your methods, were you envisioning that to be owed or due?
>
> A. [BY MR. DREHER]: Certainly, ***during the irrigation season prior to the subsequent year***. So in 2005 the amount for reasonable carryover would have been due during that irrigation season so that both sides, the ground water folks and the surface water folks, would know going into 2006 what they had.
>
> ***And at least my intent was that if the amount necessary to provide reasonable carryover was not provided in 2005, that there would be some level of curtailment in 2006. And I couldn't have made that determination unless the replacement water was provided up front***.

Tr. P. Vol. I at 103, lns. 11-25 (emphasis added). In other words, unless water is provided in-season "prior to the subsequent year" (i.e. in the season that the material injury determination is made), curtailment must follow.

Justice Schroeder echoed the former Director's intention in his *Recommended Order*, wherein upon a plain reading of the CM Rules, he found the Coalition had a right to "carryover" storage and to have that right protected from interference by out-of-priority ground water diversions. *See* R. Vol. 37 at 7076 & 7109.

The CM Rules and Idaho case law protect a senior's storage right, including the right to reasonable carryover storage. As former Director Dreher recognized, the Coalition members are each entitled to receive water ***in-season*** to compensate for the undisputed material injury caused by junior ground water diversions. If a junior could not provide water to mitigate the injury to the storage right "up front", former Director Dreher explained that the CM Rules required curtailment at that point. Tr. Vol I p. 101, lns. 3-8.

The CM Rules compel the Director's response to include an allowance for "reasonable carryover" for "***future*** years." *See* CM Rule 42.01(g) (emphasis added). Yet, the Director has now written this provision out of the CM Rules in his *Final Order* by refusing to require that water be provided "prior to the subsequent year" (i.e. for "*future* years"). Rather, the Director has unilaterally determined that carryover storage water need not be provided until sometime during the "subsequent year" – a theory supported by IGWA and Pocatello.[17]

The Director's carryover scheme demonstrates a fundamental misunderstanding about the importance of carryover storage and how it fits into the planning process for the Coalition for present and future water years. Rather than recognizing the need for carryover in-season, so that the Coalition managers can operate their projects accordingly and within their rights, the Respondents all disregard former Director Dreher's testimony and Justice Schroeder's findings,

[17] It is not surprising that the holders of junior water rights would support this scheme since, after nearly five years of "administration," no water has ever been provided *in-season* and no involuntary curtailment has occurred. By allowing the junior water rights to wait until the following season to provide carryover, the Director has provided those causing the material injury with a free pass to continue their depletions.

and instead cling to a few selected phrases from the *AFRD#2* decision[18] and accuse the Coalition of attempting to carryover their entire storage rights every year regardless of need. *See generally IDWR Br*. at 13-24; *IGWA Br*. at 34-40; *Poc. Br*. at 19-24. These misleading arguments cannot withstand scrutiny as each fails to acknowledge the plain language of the CM Rules and well-established precedent.

In reality, Coalition members rely upon their storage reserves both for meeting irrigation demand in the current irrigation season as well as making operating decisions to provide for carryover for the "subsequent year." *See* R. Vol. 34 at 6378 (carryover provides BID with "a sure knowledge [that] that much water will be there to use in the future year"); R. Vol. 32 at 6139 (AFRD#2 relies "on having a full storage right each year because the largest portion of our water right is storage"); R. Vol. 33 at 6324 (A&B "relies primarily on its storage carry over and projected run off forecasts for planning purposes"); R. Vol. 32 at 6129 ("carryover storage held by MID is a critical fact that is looked at early in our planning process for the coming irrigation season").

Coalition members "start planning for the ***next*** season's irrigation supplies based upon [] carryover." R. Vol. 33 at 6307 (emphasis added); *see also id*. at 6306 (NSCC tries to "carryover as much storage as possible"). Many Coalition members "cannot risk an inadequate carryover because [they do] not have senior natural flow rights to satisfy early season irrigation demands." *Id*. at 6307; R. Vol. 33 at 6248 ("with the increased uncertainty of Milner's 1916 and 1939

[18] IGWA spends much of its response arguing that carryover should not be provided. *IGWA Br*. at 34-40. Essentially, they assert that, by considering carryover to be "insurance" against future dry years, the Coalition members seek to "carryover water regardless of actual future need." *Id*. at 37. However, the *AFRD#2* Court specifically recognized that the CM Rule's allowance for reasonable carryover for "future years" was not facially unconstitutional. 143 Idaho at 880. IGWA's attempt to fashion a rule from the *AFRD#2* decision, therefore, is without merit – especially here, where IGWA did not file an appeal.

natural flow rights," Milner is "growing increasingly dependent on carryover storage to meet the needs of our water-users"); *see* R Vol. 37 at 7056-57, 7104-07.

SWC Managers carefully and frequently (i.e. daily) gauge their water users' demands with the quantity of water in the storage system and consequently plan their in-season deliveries based on the anticipated level of carryover for the "subsequent year." *See* R. Vol. 33 at 6307 (NSCC "self-mitigates by cutting deliveries to the Company's stockholders to provide carry-over water for the next"). As storage supplies decline during the season, Coalition members are forced to "self-mitigate" by reducing their shareholders' deliveries to ensure that there is some carryover for the next season. *Id.* In short, unless carryover storage is provided "prior to the subsequent year," the in-season material injury will be exacerbated due to the fact that the Coalition members rely upon that storage for purposes of their present year's water delivery operations.[19] As such, the Director's paper "promise" to provide carryover in the subsequent year must be rejected as it fails to protect the right to carryover storage and it impermissibly shifts the burden of water shortage to the senior right.[20]

IDWR does not dispute the need of the Managers to have their carryover storage for planning purposes. Nor does IDWR address former Director Dreher's recognition that carryover must be provided "prior to the subsequent season." *See* Tr. P. Vol. I at 103, lns. 11-25. Rather, IDWR spends much of its response addressing the apportionment of risk among water users and the use of the USBR and USACE Joint Forecast. *See IDWR Br*. at 15-24. First, IDWR contends that the Coalition is seeking to "eliminate risk" and force the junior water rights to carry the

[19] Accordingly, Pocatello's assertion that "injury occurs in the subsequent year if the amounts are not available for use," *Poc. Br*. at 20, is wrong.

[20] IGWA accuses the Coalition of "ignor[ing] historical fact" and seeking to "change the historical operation of WD01." *IGWA Br*. at 34. Yet, they fail to address the Coalition Managers' historical use of in-season carryover determinations (i.e. "prior to the subsequent year") to plan both present and future irrigation deliveries. IGWA's argument should be rejected accordingly.

entire risk of a fluctuating water supply – regardless of the cause of the fluctuation. *Id*. at 16. Pocatello joins in this distortion of the Coalition's argument. *See Poc. Br*. at 20 & 22-24. These arguments are wrong. Furthermore, they are misplaced here, where material injury is undisputed and the Coalition only seeks administration of junior water rights **in order to protect their senior rights, including storage rights and carryover**.

The Coalition does not seek to shift the risk associated with fluctuations in annual precipitation. All surface water users are subject to what nature provides. However, senior surface water users are not subject to interference with their rights caused by junior ground water diversions. The prior appropriation doctrine requires junior ground water users to bear the risk and responsibility for their depletions and injury to senior rights. *See* CM Rule 40.[21]

In addition to failing to understand the purpose of "carryover storage", IDWR attempts to hide behind the so-called "scientific approach in the February 14, 2005 order" – i.e. former Director Dreher's reliance on the USBR and USACE Joint Forecast to determine the needs of the Coalition members. *IDWR Br*. at 19. According to IDWR, former Director Dreher relied on the Joint Forecast because it "is generally as accurate a forecast as is possible." *Id*. Since the joint natural flow forecast does not come out until the "subsequent year," IDWR claims that reasonable carryover should not be determined until that time. *Id*. IDWR alleges that requiring carryover in-season would "ignore Director Dreher's scientific approach." *Id*. at 23.

IDWR cannot have it both ways. IDWR cannot rely upon former Director Dreher's so-called "scientific approach" and yet at the same time ignore the explanation that carryover must

[21] Pocatello also relies heavily on former Director Dreher's testimony regarding risk – asserting that requiring carryover be provided in-season is "unreasonably punitive." *Poc. Br*. at 19-20 & 22-24. Pocatello fails to discuss, however, Director Dreher's testimony that carryover must be provided "prior to the subsequent year" or that material injury is not disputed. When viewed in light of the evidence, Pocatello's risk argument, like the Director's, fails. Indeed, it would be "unreasonably punitive" to force the senior water right to bear the risk of injury caused by out-of-priority ground water diversions and then rely upon the next year's precipitation to make up for that injury.

be provided "prior to the subsequent year". *See* Tr. P. Vol. I at 103, lns. 11-25. In light of the former Director's testimony that carryover be provided "prior to the subsequent year," IDWR's present argument regarding the subsequent year's natural flow forecast is misleading, if not irrelevant. In fact, none of this testimony contradicts the fact that carryover water must be provided "prior to the subsequent year." *See* Tr. P. Vol. I at 103, lns. 11-25.

All Respondents argue that the Director must be able to provide carryover water during the "subsequent year" in order to avoid waste. *See IDWR Br*. at 19-21; *IGWA Br*. at 34-35 & 38-40; *Poc. Br*. at 20 & 23. Contrary to this argument, water provided to mitigate an injury to a senior's storage right and ensure "reasonable carryover" for the following year does not constitute "waste". In the event the reservoir system completely fills and water is released for flood control purposes the following year that does not excuse out-of-priority pumping the prior year. Moreover, the Respondents fail to acknowledge the fact that the reservoir system does not fill every year, and in years without adequate precipitation carryover storage is vital for the next year's water supply.

Finally, IDWR attempts to gloss over the arbitrariness of his "reasonable carryover" determinations, arguing that "nothing in the Final Order limits the right to hold carryover storage." *IDWR Br*. at 14. This argument is unpersuasive. Through the "reasonable carryover" determination, the Director has set a "baseline" or "floor" for material injury. According to the Director, unless the Coalition members drop below that floor, they are not materially injured. In other words, if BID has even ½ of an acre foot of carryover storage at the end of the season, the Director will consider BID to have *not* suffered material injury. R Vol. 8 at 1383 (setting "reasonable carryover for BID at 0 acre feet). This is the case regardless of the water year and BID's ability to deliver water to its landowners. Similarly, the Director's "reasonable carryover"

determination of 83,000 acre feet for NSCC was wholly inadequate in 2007, when NSCC used nearly all of its 350,000 acre-feet of carryover from 2007 and yet was still forced to reduce deliveries to its shareholders. R Vol. 33 at 6307-08. Similar problems exist for other Coalition members as a result of the Director's decision. *See* R. Vol. 33 at 6325 ("reasonable carryover" of 8,500 acre feet is wholly insufficient to provide A&B with an adequate supply of water); R. Vol. 32 at 6130 (MID "reasonable carryover" of 0 acre feet denies MID with the ability to plan for the future and forces MID to deplete its water resources before making a call); R. Vol. 34 at 6379 (BID's "reasonable carryover" of 0 acre feet places BID at "risk of being short every year in times of drought"); R. Vol. 33 at 6248 ("reasonable carryover" of 7,200 acre feet for Milner provides fails to provide "sufficient carryover to reduce the impacts of the ongoing drought").

Accordingly, the Director's decisions regarding reasonable carryover are arbitrary and capricious and should be rejected.

VI. The Respondents Fail to Provide Any Legal Support for the "Replacement Water Plan" Concept Created by the Director.

The Director's "replacement water plan" scheme does not comply with the CM Rules and is unconstitutional. The Hearing Officer found that the "replacement water plan" concept approved by the Director is in effect a mitigation plan that does not follow the procedural steps required to approve a mitigation plan. Furthermore, unless a mitigation plan is filed in accordance with the procedural steps of CM Rule 43, curtailment must follow, if there is a finding of material injury. See R. Vol. 37 at 7112. In spite of this, the Director found that it was:

> necessary that replacement water plans be an available administrative tool if junior water users are to be able to provide water to seniors, during the season in which it is needed, in the amount that would have accrued to the senior if curtailment were ordered – thereby making the senior whole during the pendency of the proceedings while not causing irreparable harm to the junior prior to a hearing. Replacement water plans serve a necessary role in the

> interim period after a delivery call is filed by a senior water user and before a record is developed upon which juniors can base a mitigation plan.

R. Vol. 39 at 7383.

The result of the Director's replacement plan procedure is that even though material injury exists, not one drop of replacement water has been provided in season since the beginning of this process in 2005. In responding to the position of the SWC and the Hearing Officer, the Respondents make the following arguments:

1. CM Rule 43 Mitigation Plan procedures are too cumbersome and take too long to prevent curtailment.

2. The result of following the procedure described in CM Rule 40 is too harsh since it could result in curtailment.

3. The Director has the authority to "pick and choose" which rules he desires to use and has the authority to create a unilateral procedure outside the scope of the rules.

4. IGWA argues that due process was fulfilled by the procedure utilized by the Director for a "hearing" that was conducted on June 22, 2007.

5. Pocatello argues that a Colorado case cited by the SWC, *Simpson v. Bijou Irrigation Co.* 69 P.3d 50 (2003) is not on point because the Director of IDWR has more authority than the State Engineer in Colorado.

These arguments cannot withstand scrutiny.

A. The CM Rules are Facially Constitutional and Describe the Procedures to be used by the Director.

When the SWC filed the action that lead to the decision in *AFRD #2*, the SWC argued, and the District Court found, that the CM Rules were facially unconstitutional. This argument was strongly opposed by IDWR, IGWA, and to the extent it was allowed to participate, Pocatello. The principal holding in *AFRD#2* was that the CM Rules are facially constitutional.

Now the same Respondents all argue that the rules do not need to be followed. They instead argue that the Director can "make up" additional rules and procedures. They argue that

CM Rule 5, which provides that nothing in the rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law, allows the Director to ignore the explicit procedure set forth in CM Rule 40, to extract references to "replacement water" out of CM Rule 43 (the Rule outlining the procedure for a mitigation plan), and then make up his own procedure on how he will apply the "replacement water" plan to the CM Rule 40 procedure and otherwise avoid administering water. Such actions are not supported by the CM Rules. *See* CM Rule 40 (if the Director find material injury he must either "regulate the diversion and use of water in accordance with the priorities … or allow out-of-priority diversion of water … pursuant to a mitigation plan"); CM Rule 40.01(c) (watermaster must determine whether an approved mitigation plan is in place and, if so, may allow out-of-priority diversions); CM Rule 40.04 (same); CM Rule 40.05 (any diversion in violation of the mitigation plan will result in the immediate termination of "the out-of-priority use of ground water rights … to insure protection of senior priority water rights").

The Respondents rely heavily upon the provisions of CM Rule 5, yet each fails to provide any "Idaho Law" that would allow the Director to deviate from the express procedures set forth in the Conjunctive Management Rules. CM Rule 5 does not authorize the Director to go outside the express provisions of Idaho law and the CM Rules to create an alternative procedure, a procedure without criteria, timing, and due process wholly at the discretion of the Director.

B. Not only does the Director Ignore the Procedure set forth in CM Rule 40, the Director Ignores the Procedure set forth in CM Rule 43.

The Director cobbled together an alternative procedure by ignoring CM Rule 40 and the express procedure set forth in CM Rule 43. The phrase "replacement water" does not appear in CM Rule 40. As pointed out above, once a determination of material injury is made, CM Rule

40 requires the Director to regulate by priority or to allow out-of-priority diversion only pursuant to a Rule 43 mitigation plan that has been approved by the Director.

If one wants the benefit of diverting out-of-priority pursuant to a mitigation plan, CM Rule 43 clearly sets out the procedure to be followed. First, a plan must be submitted to the Director. CM Rule 43.01. Next, the Director provides notice and a hearing and determines whether the mitigation plan will provide water in the season of need. CM Rule 43.03(c).

The Respondents now argue that the Director has the right to pull the phrase "replacement water" out of CM Rule 43, ignore the provisions requiring notice and hearing before a plan is approved and unilaterally impose the requirements of a "replacement water plan". They have cited no authority that would allow the Director to create or implement such a procedure. The procedure utilized by the Director clearly violates the explicit procedures set forth in CM Rules 40 and 43.

C. AFRD#2 Did Not Uphold the Director's "Replacement Water Plan" Concept.

In its brief, IDWR misstates the position of the SWC, the Idaho Supreme Court in the *AFRD#2* decision, and the finding of the Hearing Officer in the *Recommended Order*. IDWR argues that the Coalition claims that "replacement water plans" are not permissible, that this argument was rejected in the *AFRD#2* decision and that the Hearing Officer rejected this argument. *IDWR Br.* at 25.

Contrary to IDWR's claims, the Coalition has never argued that mitigation is not permissible. Rather, the SWC has argued that any mitigation, be it labeled a "replacement water" , "mitigation", or "injury prevention" plan, must comply with CM Rules 40 and 43. The SWC has consistently argued that the Director does not have the right to create a unilateral

"replacement water plan" procedure that does not comply with those Rules or other provisions of Idaho law and the Idaho Constitution.

Since *AFRD#2* addressed the facial constitutionality of the CM Rules, the Idaho Supreme Court did not address or uphold the Director's "replacement water plan" procedure, since it is an "as applied" creature created by the Director outside of the express wording of the Rules. The *AFRD#2* Court decision did not state that the Director had the authority to ignore the provisions of CM Rules 40 and 43. Rather, in that case the Court recognized, when administering water, that the Idaho Constitution, statutes and case law become difficult and harsh in their application in times of drought. *See AFRD#2*, 143 at 869.

Contrary to IDWR's assertions, the Hearing Officer explicitly held that the "replacement water plans" approved by the Director were in effect "mitigation plans" and that the Director's application of the concept did not follow the procedural steps required to approve a Rule 43 mitigation plan. Furthermore, "If no plan is approved and there is finding of material injury, curtailment must follow." R Vol. 37 at 7112. That is law of prior appropriation in Idaho, and the Director is bound to follow it.

D. The Director's Creation of the "Replacement Water Plan" Scheme is Not Entitled to Deference.

In its brief, IDWR goes to great lengths to argue that the Director's unilateral implementation of a replacement water plan is entitled to deference, citing the decisions of the Idaho Supreme Court in *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849 (1991) and *Pearl v. Board of Professional Discipline of Idaho State Bd. Of Medicine*, 137 Idaho 107 (2002).

Initially, it is interesting to note that in the *Pearl* decision the Idaho Supreme Court found that the Board of Medicine's discipline of a doctor was improper and violated due process

because the Board failed to provide proper notice of alleged violations of standards of care to the doctor. It is also interesting to note that *Pearl* requires a more critical scrutiny of an agency's finding if the agency's findings disagree with those of a hearing panel:

> Where the agency's findings disagree with those of the hearing panel, this court will scrutinize the agency's findings more critically. As the Court of Appeals noted in *Woodfield*, there is authority for courts to impose on the agency an obligation of recent decision making that includes a duty to explain why the agency differed from the administrative law judge.

137 Idaho at 112 (citations omitted); *see also Northern Frontiers, Inc. v. State*, 129 Idaho 437, 440 (1996) ("[a]lthough the director may disagree with the recommended decision, the hearing officer's findings are entitled great weight"). Here, the Hearing Officer explicitly found that the Director should follow the procedural steps of CM Rule 43 when considering a mitigation plan. Since the CM Rules provide an express procedure, Justice Schroeder's decision should be entitled to "great weight" on this issue. Although the Director agreed that junior ground water users should file a Rule 43 mitigation plan, he nonetheless went on to state that he would continue to use "replacement water plans" outside of the procedural steps required by CM Rule 43. R. Vol. 39 at 7383. The Director's finding is not entitled to deference for several reasons.

When analyzing the four-prong *Pearl* test, the Director's actions do not pass the test:

1. Has IDWR been entrusted with the responsibility to administer the statute at issue?

> Answer: **Yes**, pursuant to rule, law and the Constitution.

2. Is the Director's statutory construction reasonable?

> Answer: **No**. The Director's statutory construction, particularly when interpreting CM Rules 40 and 43, is that he is entitled to ignore the procedural requirements of both Rules, unilaterally create a procedure for replacement water plans, and impose those requirements without hearing. This construction of the CM Rules is clearly contrary to the express provisions of the Rules and is not reasonable. In addition, as explained below, the Director's interpretation does not provide the SWC with meaningful due process.

3. Does the statutory language at issue address the precise issue?

Answer: **Yes**. The precise issue at hand – what should happen when a senior water user is suffering material injury – is explicitly addressed in CM Rule 40, and the requirements of a mitigation plan are specifically set out in CM Rule 43. The CM Rules speak to the use of "replacement water" only in the context of CM Rule 43, which requires notice and hearing prior to implementation of the plan. The Director's "replacement water plan" scheme is clearly outside of the scope of the Rules.

4. Are the rationales underlying the rule deference present?

Answer:

4.1. Is the Director's interpretation a practical interpretation? **No**. The Director is creating a new procedure and is refusing to implement clear and unambiguous procedures set forth in the CM Rules that apply to this case.

4.2. Has the legislature acquiesced to the Director's action? This question is not yet answered. This case and the other water call cases are all matters of first impression and are just now before the district court. They have yet to go before the Idaho Supreme Court. The only action that the legislature has taken is to pass the explicit rules that the Director is now ignoring.

4.3. Does the agency have expertise? **Yes.** IDWR has expertise in water management.

4.4. IDWR does not argue that repose applies to this case.

4.5. Was the interpretation of the Director contemporaneous with agency actions? Obviously, the Director's interpretation occurred at the time that he issued orders in this case. However, this rationale is self-fulfilling when dealing with a matter of first impression.

In *Farrell v. Whiteman*, 146 Idaho 604 (2009), the Supreme Court held that if the statutes speak clearly on the issues involved in the case, the test for deference is not met. In this matter, the statutes and rules speak clearly on the issues involved in this case, and the Director has ignored the express procedure set forth in the CM Rules. Since the Director is ignoring express provisions of the CM Rules, and since those Rules deal with the precise situation at hand, the Director's decisions are not entitled to "great weight" and should not be given deference.

E. The Director Has Failed to Follow the Law and Provide the SWC Due Process in Unilaterally Approving "Replacement Water Plans".

Throughout this proceeding, the SWC has argued that individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state. IDAHO CONST. art. 15, § 4; *Nettleton v. Higginson*, 98 Idaho 87 (1977). Before IDWR allows water to be taken from a materially injured senior water right holder, IDWR must afford the senior the right to an adversary hearing to be held at a "meaningful time and in a meaningful manner." See *Aberdeen–Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999).

The Respondents do not contest these notions. In fact, IDWR, citing *Hill v. Standard Mining Co.*, 12 Idaho 223, 229 (1906), argues that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his country. *IDWR Br.* at 31. However, it is apparent from the actions taken by the Director that IDWR is more concerned about providing protection to junior water users than it is providing timely delivery of water to senior water users.

IDWR argues that "replacement water plans" are akin to a court issuing a preliminary junction in a civil matter to preserve the status quo, pending final judgment. *IDWR Br.* at 30. However, IDWR fails to point out that, if issued without a hearing, a temporary restraining order is only good for fourteen (14) days, IRCP 65(b), and that a preliminary injunction is not entered without providing an opportunity for hearing. *See* IRCP 65. If a temporary injunction is issued without a hearing and without an opportunity for the defendant to present evidence and opposition thereto, it is issued without due process. *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389 (1965).

A case cited by IDWR, *Farm Service, Inc. v. U.S. Steel Corp.*, 90 Idaho 570 (1966), has nothing to do with water rights administration.[22] Rather, it deals with a civil action seeking an injunction dealing with the exclusive right to use the words "farm service" as a trade name within a specific trade area.[23]

Similar to other issues in this case, IGWA misstates the Coalition's argument by claiming that the Coalition asserts the ground water users have not provided any water. *See, e.g., IGWA Br.* at 28. IGWA is wrong. Rather, the Coalition has consistently alleged, and is fully supported by the record in stating, that no member of the SWC has received sufficient replacement or mitigation water in the irrigation season, during the time that injury is occurring. The Respondents point to no contrary evidence in the record. This fact is undisputed.

IGWA argues that the limited hearing conducted on June 22, 2007, provided the SWC with due process for this case. As stated above, due process requires that a party be provided the right to an adversary hearing at a meaningful time and in a meaningful manner.

The hearing held on June 22, 2007 was not a hearing that afforded the SWC due process. Rather, after IGWA submitted yet another "replacement water plan" in 2007, the Coalition filed an immediate protest and motion to dismiss. Similar to the protests lodged in 2005, the Director ignored the Coalition's filing and tentatively approved IGWA's plan without hearing. R Vol. 23 at 4300 ("IGWA should be able to fulfill the commitment it pledged in its 2007 Replacement

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[22] Even the Nevada case cited by IDWR, *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 492 P.2d 123 (Nev. 1972) has nothing to do with administrating water rights by a state agency. *Memory Gardens* is also a civil action seeking an injunction resulting from one party terminating a water supply to a pet cemetery. The case does not set forth the standard in Nevada for the issuance of an injunction nor does it provide any guidance on procedures that should be utilized by IDWR.

[23] Most importantly, the case specifically holds that a preliminary injunction can only be granted after a full hearing and a showing of a clear right thereto:

> The granting or refusal of a preliminary injunction is within the discretion of the trial court. Obviously that discretion must be exercised with caution. Such an injunction can be granted only after a full hearing and a showing of a clear right thereto.

Farm Service, Inc., 90 Idaho at 587 (emphasis added).

Water Plan"). The Director scheduled a limited hearing on June 22, 2007, which was opposed by IGWA and Pocatello. The Director issued an order refusing to vacate the hearing, but went on to hold that:

> a hearing on the 2007 replacement plan is appropriate in order to provide the Director with additional information on timely acquisitions of water and other interested parties the opportunity to cross examine any witnesses called by IGWA in support of its plan and raise arguments.

R. Vol. 23 at 4397.

The Director went on to order that the hearing would not include argument or presentation of evidence on any other orders issued by the Director or the Director's method and computation of material injury. *Id.* At the hearing the Director explained the hearing was limited in scope and the Coalition would not be provided an opportunity to contest the amount of the Director's calculated injury to their senior rights:

> MR. TUTHILL: . . . So the hearing this morning is to look at the adequacy of the plan and implementation of the plan and is not for the purpose of identifying the amounts that will be provided by the plan, not in replacement for the various members of the Surface Water Coalition. That issue which has been brought as objected to by the members of the Surface Water Coalition has been subsumed into the hearing that is to take place later this year.

R Vol. 34 at 6549.

In response, the managers of the SWC entities submitted affidavits setting forth serious concerns that they had about the critically low water conditions during 2007 including the fact that temperatures were forecasted to be higher than normal, precipitation was forecasted to be lower than normal, and that several of the entities would run short of water. *See* R. Vol. 24 at 4432, 4443, 4464, 4502, 4510, 4521, and 4529. The SWC also filed a request for an updated material injury determination for 2007 water right administration including a technical memorandum dealing with an updated 2007 SWC water supply estimate. R. Vol. 24 at 4422 &

4438. The Director refused to consider the affidavits and other information for the purposes of the hearing. R. Vol. 23 at 4719. The Director had already made his determination, without hearing, of the amount of injury and the amount of water that would be required for replacement water. *The only matter* reviewed by the Director at the hearing was whether IGWA had secured and pledged sufficient replacement water to mitigate the Director's unilateral calculation of predicted material injury for 2007. As discussed *infra*, the Director's "minimum full supply" calculations were inadequate to protect the Coalition's senior rights and when used as a "cap" on water use in 2007 the action constituted a "re-adjudication" of their water rights. R Vol. 37 at 7095, 7097.

The hearing conducted by the Director dealt with only a single issue of the "replacement water plan", the ability of the Ground Water Users to provide the replacement water ordered by the Director. The Director did not provide due process to the SWC. Its members were left without the right to address predicted injury and the other components of the Director's unilateral approval of the "replacement water plan" for the 2007 irrigation season. This did not provide the SWC with a hearing at a meaningful time and in a meaningful manner that complies with constitutional due process requirements. Moreover, at the time the hearing was held, midway through the irrigation season, ground water users had already been authorized to divert their full rights out-of-priority.

F. Pocatello Ignores the Primary Holding in the Colorado *Simpson* Decision.

In its brief, the SWC directed the Court to the Colorado Supreme Court decision in *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003), which held that the Colorado State Engineer's implementation of a replacement water plan was contrary to law. Pocatello argues

that the duties and discretion of the Colorado State Engineer are different than the Director of IDWR, and therefore the *Simpson* case can be distinguished.[24]

The primary holding of *Simpson* is not addressed by Pocatello. In *Simpson*, the court held that the State Engineer in Colorado had no legal or constitutional authority to deviate from the statutes, rules and constitution of the State of Colorado and use a procedure that did not comply with statutory and constitutional augmentation [i.e. mitigation]. *See Simpson*, 69 P.3d at 69. The same standard applies in Idaho. The Director of IDWR has no legal or constitutional authority to deviate from the statutes, rules and constitution of the State of Idaho and use a procedure that does not comply with statutory and constitutional mitigation.

VII. The Use of a 10% Trim Line was Arbitrary and Capricious.

The Director's application of a 10% trim line to discriminate against senior water rights was arbitrary and capricious. The Director cites to no law or facts to justify his decision to impose the 10% uncertainty against the materially injured senior water right and to the benefit of the junior water right causing that material injury. Rather, IDWR wanders through an argument about whether or not 10% is an appropriate margin of error.

The Director misses the point. The issue here is not whether the 10% is an appropriate margin of error. Rather, the issue is whether the Director acted arbitrarily and capriciously when he imposed that 10% margin of error to the sole detriment of the materially injured senior water right by exempting certain junior water rights that are causing the material injury from any administration or mitigation obligation. In addition, the Department's own expert testified that

[24] Although Pocatello attempts to argue that the authority of the Colorado State Engineer pertaining to replacement water plans is clearly limited, the statute in question is not so clear: "the state engineer and division engineers shall exercise *the broadest latitude possible* in the administration of waters under their jurisdiction to *encourage and develop augmentation plans* and voluntary exchanges of water and may make such rules and regulations and *shall take such other reasonable action* as may be necessary in order *to allow continuance of existing uses* and to assure maximum beneficial utilization of the waters of this state." Section 37-92-501.5, 10 C.R.S. (2002) (emphasis added by Court in decision, *Simpson*, 69 P.3d at 64.)

the "10% trim line" could actually underestimate the impact of junior ground water diversions on affected river reaches by 20%. *See* Attachment C (*Spring Users' Joint Reply* at 20).

Since all hydraulically connected ground water rights are deemed legally connected for purposes of administration, the Director had no basis to exclude a certain group, on that basis of alleged model uncertainty, particularly where those rights contribute to the declines in the river.

In addition, IDWR wrongly claims the Coalition has "waived" this issue on appeal. *IDWR Br.* at 41. The case cited by IDWR plainly supports the Coalition's right to raise this issue. In *Blaine County Title Associates v. One Hundred Bldg. Corp., Inc.*, 138 Idaho 517 (2002), the Supreme Court explained:

> However, this Court has held that an issue will be considered as long as argument is provided. . . . Additionally, the Trust has met this requirement through counsel's citation of authority in his Reply Brief.

138 Idaho at 520.

This legal issue was fully briefed before the Court in the Spring Users' appeal proceedings (*Clear Springs Foods, Inc. et al. v. Tuthill et al.*, Gooding County Dist. Ct., Case No. 08-444) and, as it did in its *Joint Opening Brief*, the Coalition adopts that briefing and argument for purposes of this appeal. Contrary to IDWR's claim, the Coalition did not "waive" this issue on appeal and has hereto attached parts of briefing submitted in the other appeal for convenience of the Court. *See* Attachments B & C.

VIII. The Director Has Violated Idaho Law By Not Issuing a Final Order to Provide for the Coalition's Right to Complete and Timely Judicial Review.

IDWR misreads Idaho's APA and claims that "there is nothing in Idaho Code §§ 67-5244 or 67-5246 that requires an agency head to issue a final order that decides every contested issue". *IDWR Br.* at 42. To the contrary, the statutes as well as IDWR's own procedural rules are clear and unambiguous; the Director is mandated to issue a final order following a hearing in a

contested case. First, Idaho's APA provides the following with respect to an agency head's review of a recommended order:

> (2) Unless otherwise required, the agency head shall either:
>
> (a) issue a final order in writing within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, . . .
>
> (b) remand the matter for additional hearings; or
>
> (c) hold additional hearings.

Idaho Code § 67-5244 (emphasis added). IDWR's procedural rules follow the statute, and echo the Director's duty to decide all matters in the event he issues a "final order":

> The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good chase shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

IDAPA 37.01.01.720.02.c. (emphasis added).

Director Tuthill did not find that "further factual development of the record" was necessary since he did not remand the matter or hold any additional hearings. Instead, Director Tuthill issued a *Final Order*, pursuant to Idaho Code § 67-5244(2)(a), on September 5, 2008. R Vol. 39 at 7381. Consequently, the Director had a duty to issue a final order on all issues presented. *See* Idaho Code § 67-5246(2) ("If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.") (emphasis added).

In this case the Director failed to issue a "final order" on all issues presented in the contested case. Instead, the Director stated an intent to issue a "separate, final order" and that "an opportunity for hearing will be provided on that order". R Vol. 39 at 7386. Although the parties participated in a 3-year contested case, which included an appeal to the Idaho Supreme

Court and an administrative hearing spanning 4 weeks, the Director is now attempting to force the parties engage in yet another proceeding without any legal basis, even thought the issues in the new proceeding were fully litigated in the administrative hearing. It is telling that IDWR can cite no statute, rule, or case that would authorize the Director's current process. Instead, IDWR argues that a determination of material injury "should be based on the best information available". *IDWR Br.* at 42. This does not excuse the Director from complying with Idaho's APA and IDWR's procedural rules. If the Director believed more information was necessary he could have remanded the matter or held additional hearings. Idaho Code § 67-5244(2). Since this did not happen it is clear that the Director believed he had all the necessary information and a full factual record with which to issue a final order on September 5, 2008. The Director cannot have it both ways now. By issuing a final order, the Director had a duty to decide all issues and provide for complete judicial review of that decision. That was not done in this case.

By forcing the parties to another contested case and administrative hearing, the Director is preventing the Coalition from obtaining timely judicial review required by law. Idaho's APA plainly states that a person "aggrieved by a final order in a contested case decided by an agency . . . is entitled to judicial review". Idaho Code § 67-5270(2). Whereas Idaho law provides for a party's right to judicial review when a "final order" is issued, the Director is preventing that from occurring by his unlawful "bifurcation" of the September 5, 2008 *Final Order*. The parties should not be relegated to administrative "purgatory" just because the Director failed to comply with the statute and issue a complete final order. Therefore, the Court should order the Director to issue a Final Order that encompasses all issues in dispute rather than allow another protracted administrative case which prejudices the Coalition's senior water rights.

CONCLUSION

> In times of scarcity, administration of water under Idaho's version of the prior appropriation doctrine is not a user friendly business. To the contrary, it is harsh – there are winners and there are losers. To the extent a person is applying water in accordance with his decreed water right and is not wasting water, he is, under the Idaho Constitution, allowed to be "the dog-in-the-manger." Rules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, they are essential to proper administration and to protect vested rights.

Order on Plaintiffs' Motion for Summary Judgment at 124.

Judge Wood accurately summed up what is required of the Director in water right administration and emphasized that conjunctive management rules are "essential to proper administration and to protect vested rights." *Id.* In this case the Director failed to properly apply the CM Rules to protect the Coalition's senior surface water rights. Instead, the Director deviated from the express procedures for regulating junior priority ground water rights and struck a new path not authorized by law. The Coalition's petition for judicial review should be granted accordingly.

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Respectfully submitted this 20th day of May, 2009.

CAPITOL LAW GROUP, PLLC

By _____
C. Thomas Arkoosh

Attorneys for American Falls Reservoir District #2

BARKER ROSHOLT & SIMPSON LLP

By _____
John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

FLETCHER LAW OFFICE

By _____
W. Kent Fletcher

Attorneys for Minidoka Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2009, I served true and correct copies of the **SURFACE WATER COALITION'S JOINT REPLY BRIEF**, upon the following by the method indicated:

Deputy Clerk Gooding County District Court 624 Main St. P.O. Box 27 Gooding, ID 83330	____ U.S. Mail, Postage Prepaid X Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Courtesy Copy to Judge's Chambers: Snake River Basin Adjudication 253 3rd Ave. N. P.O. Box 2707 Twin Falls, ID 83303-2707	____ U.S. Mail, Postage Prepaid X Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Phillip J. Rassier Chris Bromley **Deputy Attorneys General** Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Randy Budge Candice M. McHugh **RACINE OLSON** P.O. Box 1391 Pocatello, Idaho 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Sarah Klahn **WHITE & JANKOWSKI, LLP** 511 16th St., Suite 500 Denver, CO 80202 sarak@white-jankowski.com	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Dean Tranmer **CITY OF POCATELLO** P.O. Box 4169 Pocatello, Idaho 83205 dtranmer@pocatello.us	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email

Kathleen Marion Carr **U.S. Department of the Interior** P.O. Box 4169 Boise, Idaho 83706 kmarrioncarr@yahoo.com	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
David W. Gehlert Natural Resources Section Environment & Natural Resources Division **U.S. Department of Justice** 1961 Stout ST. 8th Floor Denver, CO 80294 david.gehlert@usdoj.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Michael S. Gilmore **Idaho Attorney General's Office** P.O. Box 83720 Boise, Idaho 83720-0010 Mike.gilmore@ag.idaho.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Matt Howard **U.S. Bureau of Reclamation** 1150 N. Curtis Road Boise, Idaho 83706-1234 matt.howard@pn.usbr.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Lyle Swank **IDWR** 900 N .Skyline Dr. Idaho Falls, Idaho 83402-6105	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Allen Merritt Cindy Yenter **IDWR** 1341 Fillmore St., Suite 200 Twin Falls, Idaho 83301	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Josephine P. Beeman **BEEMAN & ASSOCIATES** 409 W. Jefferson Boise, Idaho 83702 jo.beeman@beemanlaw.com	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email

Terry Uhling
J.R. SIMPLOT COMPANY
999 Main Street
Boise, Idaho 83702
terry.uhling@simplot.com

- ✓ U.S. Mail, Postage Prepaid
- ____ Hand Delivery
- ____ Overnight Mail
- ____ Facsimile
- ✓ Email

James Tucker
IDAHO POWER COMPANY
1221 W. Idaho St.
Boise, Idaho 83702
jamestucker@idahopower.com

- ✓ U.S. Mail, Postage Prepaid
- ____ Hand Delivery
- ____ Overnight Mail
- ____ Facsimile
- ✓ Email

James Lochhead
Adam Devoe
BROWNSTEIN, HYATT& FARBER
410 17th St. 22nd Floor
Denver, Colorado 80202
jlochhead@bhf-law.com
adevoe@bhf-law.com

- ✓ U.S. Mail, Postage Prepaid
- ____ Hand Delivery
- ____ Overnight Mail
- ____ Facsimile
- ✓ Email

Mike Creamer
Jeff Fereday
GIVENS PURSLEY
P.O. Box 2720
Boise, Idaho 83701-2720
jcf@givenspursley.com
mcc@givenspursley.com

- ✓ U.S. Mail, Postage Prepaid
- ____ Hand Delivery
- ____ Overnight Mail
- ____ Facsimile
- ✓ Email

By _____
Travis L. Thompson